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IN THE

Supreme Court of the United States

No. 176

In the Matter of the Estate of Florence Hendricksen, Deceased

ETHEL V. KELLEY,

Petitioner,

vs.

WILLIAM F. ROHN, Executor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

RALPH R. BREMERS,
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Law Briefs—OMAHA LINO-SLUG PRINTING CO.—413 South 13th Street

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Ethel V. Kelley for this Court's writ of certiorari to review a judgment and opinion of

the Supreme Court of Nebraska rendered in this cause on January 16, 1953.

JURISDICTION

The jurisdiction of this Court to review the questions herein presented is invoked under section 237 (b) of the Judicial Code of the United States, as amended (28 U. S. C. 344). The judgment of the Supreme Court of Nebraska which was entered on January 16, 1953, became final on February 14, 1953, upon the denial of the motion for rehearing. The time for filing this petition and brief in support thereof was extended by this Court to and including July 14, 1953.

1. The pertinent verbiage under which the jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code of the United States, as amended (28 U. S. C. 344), is as follows, to wit:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had where is drawn in question the validity of * * * a statute of the United States; * * * or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any * * * statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *"

2. The Supreme Court of Nebraska is the highest

Court of the State of Nebraska, Article V, Section 1, ~~final judgment of the Supreme Court~~ CONSTITUTION OF THE STATE of Nebraska (R. ~~220~~ 69).

3. The judgment of which review is sought is a final judgment of the Supreme Court of Nebraska (R. 69).

The federal question was raised in the Supreme Court of Nebraska on appeal from the decision of the District Court of Douglas County by assignments of error and propositions of law, to-wit:

(a) "The Court erred in finding that the laws and regulations of the Federal Government and the Treasury Department have no application to the facts in this case requiring the transfer of said bonds."

(b) "The Court erred in finding that the Bonds involved herein were purchased with deceased's money only as it is immaterial as provided by Federal Law and pertinent Regulations of the Treasury of the United States governing said Bonds."

(c) "By reason of regulations of the Secretary of the Treasury promulgated pursuant to power delegated to said officer of the United States by the Congress, a surviving co-owner of United States Savings Bonds is the sole and absolute owner thereof, as though they were registered in his name alone. Section 315.45 (c), United States Treasury Department Circular No. 530, Sixth Revision, 13 February, 1945, as amended."

(d) "The Treasury Regulations are valid and have the force and effect of Federal law, Article I, Section 8, Clause 2, Constitution of the United States; Article I, Section 8, Clause 18, Constitution of the United States; Section 22 of Second Liberty Bond Act, 31 U. S. C. A., Section 757 (c) (a), as amended."

(e) "The Treasury Regulations, having the force of Federal law, must be held to supersede inconsistent state law by virtue of the 'Supremacy clause' of the Constitution of the United States. Article VI, Clause 2, Constitution of the United States."

(f) "The survivorship right of a co-owner of a United States Savings Bond is derived also from a Federal Contract governed by Federal law, and must be upheld apart even from consideration of the "Supremacy Clause", Article I, Section 8, Clause 2 and Article I, Section 8, Clause 18, Constitution of the United States; Section 22 of Second Liberty Bond Act, 31 U. S. C. A., Section 757(c)(a), as amended."

This petitioner, Ethel V. Kelley, contended throughout the entire proceedings from the County Court of Douglas County, Nebraska, to and including that before the Supreme Court of Nebraska and still contends that these Series G, United States Savings Bonds, were not transferable and that the Government would not recognize a transfer inter vivos as provided at Section 315.13, United States Treasury Department Regulations governing United States Savings Bonds, Department Circular No. 530, Sixth Revision, February 13, 1945.

The Supreme Court of Nebraska held that, "The primary purpose of the Treasury Department regulations is to prevent the government from being involved in suits between claimants to government bonds. These Treasury Department regulations refer to the bonds themselves, providing protection to the government if its agents pay the named owner or co-owner. In addition the government's power to borrow money at a fixed rate of interest should not be burdened by defending litigation. * * * The government would have no interest as

to how the assets of Florence Hendricksen's estate would be distributed, or that by the last will of Florence Hendricksen, Ethel V. Kelley had no further rights in the estate so long as she retained the proceeds of the bonds. It seems clear that the federal laws and regulations are not intended to interfere with the positive act of two co-owners of bonds by which one conveys her interest in them to the other. In the instant case, as shown by the evidence, Ethel V. Kelley assigned all her right, title and interest in the bonds to her mother during her mother's lifetime, and for a valuable consideration."

"The government's interest is a contractual one. * * * When the Treasurer of the United States satisfied the government's obligation by paying the proceeds of the bonds to Ethel V. Kelley, the government's interest in the matter ended."

The Supreme Court of Nebraska specifically disregarded the fact that the Treasury Regulations are controlling as to the rights which registrants have in United States Savings Bonds. Particular reference is made to United States Treasury Department Regulations governing United States Savings Bonds, Department Circular No. 530, Sixth Revision, February 13, 1945, as amended, as correlated with Department Circular No. 654, Treasury Department, second revision which became a part of the terms of the instant bonds "as fully as if herein set forth".

QUESTIONS PRESENTED

1. Whether the judgment below was final within the meaning of Section 237 (b) of the Judicial Code, as amended (28 U. S. C. 344).

2. Whether the federal questions were properly presented below.

3. Whether a valid transfer of United States Savings Bonds may be made by a written assignment of one of the co-owners thereof to the other co-owner under the provisions of Sections 315.2, 315.11, Section 315.13 (1), United States Treasury Department Regulations, Department Circular No. 530, Sixth Revision, February 13, 1945, as amended, in the absence of fraud.

4. Whether the primary purpose of the United States Treasury Department regulations governing United States Savings Bonds, Series G, are only for the purpose of preventing the Government from becoming involved in suits between claimants to such Government Bonds.

5. Whether the Rules and Regulations of the United States Treasury Department governing United States Savings Bonds, Series G, have applicability to the ownership of United States Savings Bonds and the proceeds thereof.

6. Whether the title to the United States Savings Bonds, Series G, involved herein should have been considered by the Supreme Court of Nebraska to have been based on Federal contract subject to the pertinent Statutes of the United States Government and the rules and regulations promulgated by the Treasurer of the United States based upon said Statutes.

7. Whether the petitioner herein, Ethel V. Kelley, received a sole and absolute legal title in and to the United States Savings Bonds, Series G, owned by Florence Hendricksen, deceased, and herself as registered co-

owners with right of survivorship at the time of the demise of said Florence Hendricksen.

8. Whether the abandonment of a purported contract to assign United States Savings Bonds, Series G, may be effected by the subsequent acts of one of the registered co-owners inconsistent with its existence and such abandonment be acquiesced in and acted upon by the other co-owner in the absence of fraud.

9. Whether, in this particular case, the judgment of the Supreme Court of Nebraska conflicts with and overrides the Rules and Regulations of the Treasury Department of the United States governing United States Savings Bonds, Series G, and the Federal Statutes upon which they are based thus constituting a dangerous precedent.

10. Whether the judgment of the Supreme Court of Nebraska deprived the petitioner of rights, titles, privileges and immunities set up and claimed under a Federal contract based upon pertinent Statutes of the United States and Treasury Rules and Regulations governing said contract for the purchase and surrender of United States Savings Bonds, Series G, under which petitioner was a third party beneficiary, and deprived petitioner of her property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATUTES

The Constitution of the United States and Statutes involved are set forth in the Appendix, infra, pp. 10-17.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Nebraska erred:

1. In holding that the primary purpose of the Treasury Department regulations is to prevent the Government from being involved in suits between claimants to Government Bonds.

2. In holding that "by the last will of Florence Hendricksen, Ethel V. Kelley had no further rights in the estate so long as she retained the proceeds of the bonds."

3. In holding that the federal laws and regulations are not intended to interfere with the positive act of two co-owners of bonds by which one conveys her interest in them to the other.

4. In holding that when the Treasurer of the United States satisfied the government's obligation by paying the proceeds of the bonds to Ethel V. Kelley, the government's interest in the matter ended.

5. In holding that the laws of the United States and regulations of the United States Treasury Department governing said bonds do not prevent the declaration of a resulting trust in the proceeds of the United States Savings Bonds, Series G, under the facts in this case.

6. In failing to hold that the surviving co-owner, petitioner herein, was the sole and absolute owner of the bonds which she held after Florence Hendricksen's demise and that payment or reissue would be made to her only as though the bonds were registered in the surviving co-owner's name alone as provided in Section 315.45 (c), United States Treasury Department Regulations, Department Circular No. 530, Sixth Revision.

7. In failing to hold that the petitioner herein was entitled to cash the six bonds without requiring the signature of the other co-owner and that upon payment to Ethel V. Kelley the interest of Florence Hendricksen in and to said six United States Savings Bonds ceased as provided in Section 315.45 (a), United States Treasury Department Regulations governing United States Savings Bonds, Department Circular No. 530, Sixth Revision.

CONCLUSION

WHEREFORE, petitioner prays that this petition for a writ of certiorari be granted, and that this Court's writ of certiorari issue to the Supreme Court of Nebraska for the purpose of reviewing the questions hereinbefore specified.

.....

RALPH R. BREMERS,
Counsel for Petitioner.

State of Nebraska }
County of Douglas } ss.

Ethel V. Kelley, being first duly sworn, upon her oath, deposes and says that she is the petitioner in the above captioned case; that she has read the foregoing petition for writ of certiorari, knows the contents thereof and that the allegations and statements therein contained are true as she verily believes.

ETHEL V. KELLY.

Subscribed in my presence and sworn to before me, a general notary public, this 11th day of July A. D., 1953.

.....

General Notary Public

APPENDIX A

The Constitution of the United States and Statutes involved in the instant case are, to-wit:

Article I, Section 8, Clause 2 of the Constitution reads:

> "The Congress shall have power * * * to borrow money on the credit of the United States."

Article I, Section 8, Clause 18, reads:

> "The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

Fourteenth Amendment, Sections 1 and 4, read:

"AMENDMENT XIV.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> * * * * *
>
> "Section 4. The validity of the public debt of the United States, authorized by law, * * * shall not be questioned."

Article VI, Clause 2, reads as follows:

> "Clause 2. Supreme Law of Land.

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Act of February 4, 1935, c. 5, §6, 49 Stat. 21, added a new section to the Second Liberty Loan Act, reading as follows:

"Sec. 22. (a) The Secretary of the Treasury, with the approval of the President, is authorized to issue, from time to time, through the Postal Service or otherwise, bonds of the United States to be known as 'United States Savings Bonds.' The proceeds of the Savings Bonds shall be available *to meet any public expenditures* authorized by law and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. *The various issues and series of the Savings Bonds shall be in such forms,* shall be offered in such amounts within the limits of section 1 of this Act, as amended, *and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b) and (c) hereof, and including any restriction on their transfer, as the Secretary of the Treasury may from time to time prescribe.* (Italics supplied.)

"(b) Each Savings Bond shall be issued on a discount basis to mature not less than ten nor more than twenty years from the date as of which the bond is issued, and *provision may be made for redemption before maturity upon such terms and conditions as*

the Secretary of the Treasury may prescribe:[1] * * *"
(Italics supplied.) (Sub-section (c) relates to tax exemption; and is inapplicable to the present case.)

Pursuant to the duty and authority vested in him by section 22, *supra,* and the general power given to heads of executive departments by R. S. sec. 161 (5. U. S. C. 22), the Secretary of the Treasury promulgated regulations as to United States Savings Bonds. The wording in effect during the period involved in this case, constituting Treasury Department Circular 530, Sixth Revision, is found in C. F. R., 1945 Supplement, Title 31, Part 315. Earlier editions of Circular 530 vary somewhat, but not in any manner relevant to the present case.[2] The material provisions of the regulations are as follows:

"Subpart A—Applicability

"§315.1 *Applicability of regulations.* The regulations in this part, published for the information and guidance of all concerned, apply generally to all United States Savings Bonds of all series of whatever designation and bearing any issue dates whatever, except as otherwise specifically provided herein.

"Subpart B—Registration

"§315.2. *General.* United States Savings Bonds

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1 The Second Liberty Loan Act itself, and the earlier amendments thereof, and also the various amendments of sec. 22 (cited to the text at 31 U. S. C. 757 (c), all contain provisions, similar to the italicized words in the above quotation, to the effect that the form, denominations, terms and conditions of issue, conversion, redemption and payment shall be such as the Secretary of the Treasury may prescribe. See 31 U. S. C. (1940 Ed.), secs. 752, 753, 754, 757, 757(c).

2 See Fourth Ed. dated April 15, 1941, amended June 26, 1941, and April 20, 1942; Fifth Edition, dated June 1, 1942, amended November 23, 1942, June 17 and October 27, 1943, January 1, May 1, September 5, and November 17, 1944.

are issued only in registered form. The name and post office (mailing) address of the owner, as well as the name of the co-owner or designated beneficiary, if any, and the date as of which the bond is issued will be inscribed thereon at the time of issue by an authorized issuing agent. The form of registration used must express the actual ownership of and interest in the bond, and except as otherwise specifically provided in the regulations in this part, *will be considered as conclusive of such ownership and interest. The Treasury Department will recognize no notices of adverse claims to savings bonds and will enter no stoppages or caveats against payment in accordance with the registration of the bonds.* No designation of an attorney, agent or other representative to request or receive payment on behalf of the owner, nor any restriction on the right of such owner to receive payment of the bond, other than as provided in these regulations, may be made in the registration or otherwise.

"315.4. *Authorized forms of registration, Series E, and general provisions relating to their use—(a) Forms of registration.* Bonds of Series E may be registered only in the names of individuals (natural persons), whether adults or minors, in their own right in one of the following forms:

"(1) *One person.* In the name of one person, for example: 'John A. Jones.'

"(2) *Two persons; coownership form.* In the names of two (but not more than two) persons in the alternative as coowners, for example:

John A. Jones or Mrs. Ella S. Jones.

No other form of registration establishing coownership is authorized.

"(3) *Two persons; beneficiary form.* In the name of one (but not more than one) person, pay-

able on death to one (but not more than one) other person, for example:

John A. Jones, payable on death to Miss Mary E. Jones.

'Payable on death to' may be abbreviated as 'p. o. d.' The first person named is hereinafter referred to as the owner or registered owner, and the second person named as the beneficiary or designated beneficiary.

"Subpart D—Limitation on Transfer and Judicial Proceedings

"§315.11. *Not transferable. Savings bonds are not transferable and are payable only to the owners named thereon, except in case of the disability or death of the owner,* authorized reissue, or as otherwise specifically provided in this subpart, but in any event only in accordance with the provisions of the regulations in this part. A savings bond may be hypothecated or pledged as collateral for a loan or used as security for the performance of an obligation, except as provided in §315.12 (§315.12 authorizes pledge of bonds with Secretary of the Treasury in lieu of surety in certain situations.)

"§315.13. *Judicial proceedings (judgment creditors, trustees in bankruptcy, receivers of insolvents' estates and conflicting claimants.).* A claim against an owner or coowner of a savings bond and conflicting claims as to ownership of or interest in such bond as between coowners or the registered owner and a designated beneficiary, will be recognized when established by valid judicial proceedings and payment or reissue will be made, upon presentation and surrender of the bond, except as follows:

"(a) *No such procedings will be recognized if they would give effect to an attempted voluntary*

transfer inter vivos of the bond or would defeat or impair the rights of survivorship conferred by the regulations in this part upon a surviving co-owner or beneficiary.

"(b) A judgment creditor, a trustee in bankruptcy or a receiver of an insolvent's estate will have the right to payment (but not to reissue) and a judgment creditor will be limited to payment at the redemption value current thirty days after the termination of the judicial proceedings or current at the time the bond is received, whichever is smaller.

"(c) If a debtor, or bankrupt, or insolvent, is not the sole owner of the bond, payment will be made only to the extent of his interest therein, which must be determined by the courts or otherwise validly established.

"A divorce decree ratifying or confirming a property agreement between husband and wife or otherwise settling their respective interest in savings bonds will be recognized and will not be regarded as a proceeding giving effect to an attempted voluntary transfer for the purpose of this section.

"§315.15. *Notice of pending proceedings not accepted. Neither the Treasury Department nor any agency for the issue, reissue, or redemption of savings bonds will accept notices of adverse claims or of pending judicial proceedings or undertake to protect the interests of litigants who do not have possession of the bonds.*

"Subpart M—Two Names; Beneciciary Form

"§315.46 *Payment or reissue.* A savings bond registered in the name of one person payable on death to another, for example, 'Henry W. Ash, payable on death to John C. Black,' will be paid or reissued as follows:

"(a) *Payment to the registered owner.* The bond will be paid to the registered owner during his lifetime upon his properly executed request as though no beneficiary had been named in the registration.

"(b) *Reissue during the lifetime of the registered owner.* (1) *The bond will be reissued, on the duly certified request of the registered owner, to name the beneficiary designated on the bond as coowner.* Bonds so reissued upon the request of the original owner will be considered for the purposes of computation of holdings under Subpart C of these regulations as originally issued in both names and no reissue will be effective which results in any one person holding bonds in excess of the established limit for the series to which the bonds belong.

"(2) *The bond will also be reissued upon the duly certified request of the registered owner, together with the duly certified consent of the designated beneficiary, to eliminate such beneficiary or to substitute another person as beneficiary, or to name another person as coowner.* Under this provision the bond may be reissued in the name of a trustee of a living trust created by the owner for his benefit, in whole or in part, during his lifetime, whether or not containing an absolute power of revocation in the grantor, if it is a bond of a series which may be originally issued in the name of a trustee.

"(3) If the beneficiary should predecease the registered owner, upon proof of such death and upon request of the registered owner the bond may be reissued as thought it were registered in his name alone. * * *

"(c) *Payment or reissue after the death of the registered owner. If the registered owner dies without having presented and surrendered the bond for payment or authorized reissue and is survived by the beneficiary, upon proof of such death and survivor-*

ship, the beneficiary will be recognized as the sole and absolute owner of the bond, and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor. If the registered owner dies after he has presented and surrendered the bond for payment, payment of the bond, or check, if one has been issued, will be made to his estate (see Subpart N). If the registered owner dies after the bond has been presented and surrendered for an authorized reissue, the bond will be treated as though such reissue had been made before the death of the registered owner (see §315.35).

"(d) *Payment or reissue after the death of the surviving beneficiary.* If a surviving beneficiary who becomes entitled to the bond under the provisions of paragraph (c) of this section, dies without having presented and surrendered the bond for payment or reissue, the bond will be considered as belonging to his estate and will be paid or reissued accordingly (see Subpart N). In this case, proof of the death of both the registered owner and the beneficiary and of the order in which they died will be required.

"The term 'presented and surrendered' as used in this subpart means the actual receipt of a bond, for payment, by a Federal Reserve Bank or the Treasury Department, or an incorporated bank or trust company or any other agency duly qualified to make payment of the bond, or, for reissue, by a Federal Reserve Bank or the Treasury Department, with an appropriate request for the particular transaction.

"Subpart R—Further Provisions

"§315.59. *Regulations prescribed.* The regulations in this part are prescribed by the Secretary of the Treasury as governing United States Savings Bonds issued under the authority of section 22 of the Second Liberty Bond Act, as amended, and pursuant to the various Department Circulars offering such bonds for sale. * * *"

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BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Law Briefs—OMAHA LINO-SLUG PRINTING CO.—413 South 13th Street

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INTRODUCTORY STATEMENT

This case is here on a petition for a writ of certiorari to review the judgment of the Supreme Court of Nebraska, entered on the 16th day of January, 1953, sustaining a judgment of the District Court of Douglas County, Nebraska, in favor of the appellee, and denying a rehearing in said case on the 14th day of February, 1953.

OPINIONS BELOW

The judgment of the Supreme Court of Nebraska is reported in 56 N. W. 2d, at page 711. No opinion is reported as to the denial of the motion for a rehearing.

The judgment of the District Court of Douglas County, Nebraska, is unreported (Decree at R. ~~21~~ 8).

SUMMARY OF ARGUMENT

1. The judgment of the Nebraska Supreme Court was final.

2. The Federal Question was properly presented in the record.

3. The Supreme Court of Nebraska refused to follow the pertinent Rules and Regulations issued by the Treasury Department of the United States governing the transfer of United States Savings Bonds, in that it held and maintained that a purported written assignment between the co-owners of the bonds, detached from the bonds, was sufficient to cause a valid transfer between the co-owners of the bonds.

THE FEDERAL QUESTION WAS PROPERLY PRESENTED IN THE RECORD

We submit that the federal question was properly presented, for the following reasons:

(a) The question was adequately raised in the trial court under the principle of clear intendment.

(b) In any event, the question could not be waived, since it involved jurisdiction over the subject matter.

(c) It is immaterial how the question was raised in the trial court, since the Supreme Court of Nebraska considered and decided it.

STATEMENT OF THE CASE

This is an action brought by one William F. Rohn, an attorney-at-law and the executor of the estate of Florence Hendricksen, deceased, for a declaratory judgment to have the proceeds of the sale of certain United States Savings Bonds, Series G, of the maturity value of $10,000, held by Ethel V. Kelley, the daughter of the deceased, and one of the legatees under the will, to be declared assets of the estate of Florence Hendricksen, deceased (R. ~~47~~ 1).

On March 19, 1948, Mrs. Kelley went with Mrs. Hendricksen to Fremont, and Mrs. Hendricksen, while there, purchased from the Stephens Bank at Fremont, $10,000 maturity value of U. S. Savings Bonds. These bonds were purchased in the names of Florence Hendricksen and Ethel V. Kelley, as co-owners (R. ~~100~~ 90, ~~151~~).

On the 30th day of March, 1948, William Rohn, drew a will for Florence Hendricksen wherein she devised all of her property to her three children. On the same day, William Rohn had Mrs. Hendricksen also sign a written statement, which is in words and figures, as follows, to-wit:

"Mar. 30, 1948.

Wm. Rohn:

Today I signed my will in your office. I have $10,000 Series G. United States Savings Bonds Nos. M6-266-759 G to and including M6-266-768 G. These were purchased with my money only and are to be entirely a part of my estate. My daughter, Mrs. Ethel

V. Kelley, was in the Stephens Bank with me when they were issued and she requested the bank to issue them in this manner and I permitted it only to prevent an argument and to save embarrassment. Ethel Kelley is to have only the interest in these bonds that is given her in my will of this same date.

/s/ Florence Hendricksen."

(Ex. 3, R. ~~108~~ 20, R. ~~104~~ 21.)

On the 9th day of May, 1948, William F. Rohn had Ethel V. Kelley sign the following statement:

"May 9, 1948.

The undersigned, Ethel Kelley, for value received, herewith sells, assigns, and transfers to her mother, Florence Hendricksen, any interest she may have or purport to have in $10,000.00 Series G United States Savings Bonds, numbers M6-266-759 G. to and including M6-266-768 G. Ethel Kelley further states that she had no interest in these bonds at the time her name was placed thereon and agrees that she shall have only such interest in the bonds as may be given her under the will of Florence Hendricksen.

/s/ Wm. Rohn,
Witness.
/s/ Ethel Kelley." (R. ~~109~~ 24, ~~110~~ 25, E4, ~~R. 110, R. 111~~)

On the 3rd day of June, 1949, Mrs. Harry Kelley, the petitioner herein, sent from Omaha to Rohn, at Fremont, Nebraska, Exhibit 5, a letter, which reads as follows:

"Please send all of the papers to Omaha.

/s/ Mrs. Harry Kelley." (E5, R. ~~112, 113~~ 25, 26)

Rohn wrote out a receipt for Mrs. Hendrickson to sign, directed her to sign it and return it to him, wherein

he had her give him a receipt to the effect that she directed him to turn over to her certain designated bonds and stocks, but he did not turn over to her all of her property which he held (R. ~~114~~, E6, R. ~~117~~).

On June 11, 1949, Rohn wrote to Mrs. Hendricksen, at Omaha, wherein he recited that he had enclosed to her certain items of property which he held, belonging to Mrs. Hendricksen, but in which he stated that he was sending her "all of your property we have other than your Building & Loan stock." The letter further recited: "You will specifically remember that the $10,000 in bonds are made out to you and Mrs. Kelley jointly, and that we have copies of papers showing you to be the sole owner." (E7, R. ~~118~~). He admitted in the trial that he had advised Mrs. Hendricksen to have the Bonds reissued (R. ~~140~~).

Mrs. Hendricksen received the bonds and in due course turned them over to Mrs. Kelley, saying, as she did so: "Ethel, I want you to have these bonds." (R. ~~131~~)

THE FEDERAL QUESTION INVOLVED

The federal question which the Supreme Court of Nebraska was required to decide in the case at bar was whether or not the title to the Series G, United States Savings Bonds issued to "Florence Hendricksen and Ethel Kelley" were validly transferred from Ethel Kelley to Mrs. Florence Hendricksen by a purported written assignment, not attached to the bonds, and prepared by the respondent's attorney. The specific question is: Can one of two co-owners of United States Savings Bonds, issued by the Treasury Department of the United States Government, pursuant to Treasury Department circular No. 530, issued by said Department on February 13, 1945,

transfer said bonds from one to the other, by one of the co-owners advising the other that the latter owner has no interest in the bonds and asking the latter owner to sign a written statement to the effect that the latter assigns the bonds over to the first co-owner, and containing the further statement that the latter co-owner has no interest in the bonds, and that she never had nor does she now claim that she is entitled to any interest in the bonds.

ARGUMENT

In the petition filed in the instant case in the District Court of Douglas County, Nebraska, Docket 433, No. 66, the Respondent herein alleged:

> "That said Exhibits B and C have the legal effect of making said Series G Bonds * * * a part of the assets of the estate, for which the beneficiary, Ethel V. Kelley should be required to account." (R. 2)

The Supreme Court of Nebraska, in passing on the question of that assignment, said:

> "It seems clear that the federal laws and regulations (In re Hendricksen Estate, 56 N. W. 2d, p. 711, 719) are not intended to interfere with the positive acts of two co-owners of the bonds, by which one conveys her interest in them to the other. In the instant case, as shown by the evidence, Ethel V. Kelley assigned all her right, title and interest in the bonds to her mother." (R. 222)

In its decision, the Supreme Court of Nebraska decided that the regulations of the United States Treasury Department were not to be considered at all. The contention of the petitioner is that the only method by which the transfer could be validly accomplished was by fol-

lowing the regulations—surrender the bonds and have them re-issued.

In the case of *Indiana ex rel. Anderson vs. Brand*, —— U. S. ——, 82 L. ed. (Adv. 444), 58 S. Ct. 443, 113 A. L. R. 1482, it is said:

> "Where a state court does not decide against a petitioner or appellant upon an independent state ground, but, deeming a Federal question to be before it, actually entertains and decides that question adversely to the Federal right asserted, the Supreme Court of the United States has jurisdiction to review the judgment, if it is a final judgment; and cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-Federal ground."

In the case of *Harvey v. Rackliffe*, —— Me. ——, 161 A. L. R. 296, 41 A. 2d 455, a syllabus is as follows:

> "A Treasury regulation to the effect that after the death of the registered owner of war savings bonds, the beneficiary, if surviving, will be recognized as the sole and absolute owner, and that after the death of the surviving beneficiary, the bond may be paid or reissued as though it were registered in the name of the surviving beneficiary alone, overrides any rule of state law whereby the proceeds of such bonds would belong to the estate of the one who furnished the money for their purchase."

The evidence showed that the bonds were issued by the Federal Government to "Florence Hendricksen or Ethel V. Kelley," on the 19th day of March, 1948; that the bonds bear on their back the following condition: "That this bond is issued pursuant to treasury department cir-

cular No. 654, second revision, and is subject to the terms and conditions (R. ~~213~~ 67) stated on the back thereof." That on the back of the bonds it is recited: "This bond is not transferable, and except as provded in said regulations, it is payable only to the *registered owner.*" Mrs. Kelley is the only surviving owner named in the bonds. And it is further recited on the back of the bonds as follows: "This bond is issued pursuant to Treasury Department Circular No. 654, second revision, and is subject to the terms and conditions thereof and the regulations prescribed thereunder, as if herein set forth."

The regulations provide:

> "Section 315.13. A claim against an owner or co-owner of a savings bond and *conflicting claims as to ownership of or interest in such bonds as between co-owners* * * * will be recognized when established by valid judicial proceedings, and payment or reissue will be made upon presentation and surrender of the bonds, except, as follows:
>
> "(1) No such proceedings will be recognized if they would *give effect to an attempted voluntary transfer inter vivos of the bonds,* or would *defeat or impair the right of survivorship conferred by these regulations upon the surviving co-owner* or beneficiary."

The attempted transfer originated by William Rohn, not by cashing the bonds and having them re-issued, but by letter written by him, addressed to William Rohn, and signed by Mrs. Hendricksen. This violated the regulations, in that:

1. It was not shown that the transfer was evidenced by a valid judicial proceeding, but by a proceeding devised by Rohn.

2. It was an attempted voluntary inter vivos transfer of the bonds.

3. It was a transfer which would impair and defeat the right of survivorship conferred by the regulations upon the co-owner, Ethel Kelley, all contrary to the regulations governing said bonds.

Rohn, himself, testified "that the bonds should be cashed (R. 140) and re-issued, but that it would be expensive to follow that procedure". He was attempting to improve upon the procedure provided for in the Treasury regulations, without first ascertaining whether his scheme was better and more efficacious than the proceedings provided for by the Treasury Department.

The bond recites on the back side thereof:

> "This bond is not transferable and, except as provided in said regulations, it is payable only to the registered owner."

Mrs. Kelley's name remained on the face of the bonds as one of the registered owners. The proper method for the transfer of the bonds is fully set out in the Treasury regulations.

In the case of *Stephens v. First National Bank of Nevada*, 176 P. 2d 756, Nevada, 1948, as in the case at bar, the question was the ownership and the right to possession of the bonds. The court said:

> "Mrs. Stephens at the time of the purchase of the bonds in the manner in which they were purchased, to-wit, inscribed to the deceased, Paul F. Glandman and Mrs. Una E. Stephens, as co-owners, thereupon became the co-owner in the said bond and had

> a property interest therein, and she could be divested thereof only in the form set forth by the government regulations; that is, by removing the bonds from said safe deposit box and cashing the same or having the same reissued."

She could be divested thereof only by following the form set forth in the government regulations; that is, by selling the bonds and having the same reissued. Why Rohn did not follow the government regulations may readily be guessed. It did not redound to the benefit of his client, if she did actually desire to bring about a reissue of the bonds, but she must be held to have elected to have done what she actually did do, and that was, that she failed to make a transfer of the bonds.

The attempt of William Rohn to transfer the bonds, as is held by the decision of the court, is a "subterfuge to avoid the consequences of the federal regulations against transferability," nor did the alleged transfer, as planned by Rohn, "constitute an equitable assignment" of the bonds, as is the contention of Rohn.

In the case of *Cook v. Marks,* 302 Mich. 55, 4 N. W. 2d 465, 140 A. L. R. 1429, a syllabus is as follows:

> "A plan conceived by lenders to enable a wife to use, as security for a loan, nontransferable United States savings bonds issued in the name of her husband and herself, pursuant to which she delivered the bonds to the lenders with a request for payment signed by her in due form, and agreed that the holder of the note representing the loan might after a named period send sufficient bonds to the Treasury to repay the loan, and that she would indorse the check to be issued in her name or, if she failed to do so, the holder might indorse her name, is a subterfuge to

avoid the consequences of the Federal regulations against transferability; and a court of equity will refuse relief as between the parties thereto."

In the case of *Re Wallace,* 266 Ill. App. 500, 140 A. L. R. 1436, it is said:

> "But a nontransferable United States Treasury savings certificate cannot be the subject of a valid gift inter vivos, and an attempt to so transfer it will not constitute an equitable assignment thereof, since equity cannot lend its aid to effect such result in contravention of the prohibition against transfer."

In the case of *Re Owens,* 177 Misc. 1006, 32 N. Y. S. (2d) 747, 140 A. L. R. 1436, it is said:

> "Nontransferable United States savings bonds of Series A could not be made the subject of transfer by a gift inter vivos."

In the case of *Re Ballard,* 161 Misc. 785, 293 N. Y. S. 31, 140 A. L. R. 1436, an action with reference to veterans' bonus bonds, the court said:

> "Congress necessarily had the right to prohibit their assignment or transfer, that such prohibition was made undoubtedly as a matter of public policy for the protection of the veteran, and that it was the legislative intent that an improvident sale of such securities should be prevented and that no transfer by gift or otherwise should be countenanced."

In the case of *In re Bartlett* (N. Y.), 71 Fed. Supp. 514, the bankrupt purchased, through payroll deductions, 13 Series E United States War Savings Bonds, in the name of Harold M. Bartlett, payable on death to Mrs. Anna Bartlett (his mother). The mother testified that the son gave them to her for insurance for herself. The

bankrupt testified that he gave them to his mother, "in case anything happened to me." The court held that the bankrupt should turn over to the Referee in Bankruptcy, all of said bonds, and empowered the Trustee to redeem the bonds and receive the proceeds thereof. This decision was affirmed on appeal. The court said:

> "The contention that the bankrupt parted with his ownership of the bonds by reason of the gift of same to his mother may be speedily disposed of. The Act, 31 U. S. C. A., Sec. 757c, pursuant to which the bonds were issued, itself provides that the bonds when issued may be restricted as to transfer by regulation prescribed by the Secretary of the Treasury. Such regulations have the force of law. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 S. Ct. 155, 64 L. Ed. 297. The bonds recite on their face that they are not transferable, and the regulations above referred to so provide. Code of Fed. Reg., Cum. Supp. Title 31, Section 315.8.
>
> "The terms of the bonds themselves and the unequivocal language of the regulations relating thereto prohibit the transfer of the owner's interest therein by gift. * * * Inquiry as to the sufficiency of the evidence to establish whether or not a gift had in fact been made in the instant case is, therefore, unnecessary. * * *
>
> "The Referee's conclusion to the effect that the bankrupt was the sole owner of the bonds in question, and that they should be surrendered to the trustee so that he might enforce the creditor's rights afforded in Section 315.15, etc., of the regulations is entirely correct."

In the case of *Gans v. Gans*, 98 N. Y. S. 2d, 466, a syllabus is as follows:

> "In action for delivery of series E federal savings bonds to plaintiff, defendant's counterclaim and

defense alleging agreement to hold bonds for him and transfer them to him on request, endorsement of bonds by plaintiff, and failure of transfer because of plaintiff's failure to appear before official who could certify to transfer were insufficient as alleging attempt to transfer inter vivos which federal treasury regulations state would not be recognized though a court gives effect to attempted transfer."

In the case of *Bergman v. Greenwich Sav. Bank*, 74 N. Y. Supp. 2d, 638, an action by Albert B. Bergman, as administrator of the estate of Louis J. Bergman, deceased, against the Greenwich Savings Bank and others to establish gifts causa mortis of U. S. War Savings Bonds, Series G. A syllabus is as follows:

"United States War Savings Bonds, Series G, were not the subject of a gift either inter vivos or causa mortis, where bonds provided that they were not transferable, and at time bonds were procured by deceased, Treasury Regulation provided that bonds were payable only to the owner named therein, and that Treasury Department would recognize only the inscribed owner, during his lifetime and competency, and thereafter his estate or heirs."

On page 640 it is said:

"According to Samuel Butler, the quondam barrister-bard, 'a man may be the legal donor of anything whereof he's owner, and may confer it where he lists, in the judgment of all casuists' (Hudibras, Part 2, Canto 1); that is a fair statement of the law regarding a man's right to make a gift of his personalty but it is inapplicable to the transfer of title by gift to war savings bonds when they stand alone in their owner's name; the regulation of the Treasury Department takes precedence over the owner's ordinary right to dispose of such bonds which could be effected either by actual or symbolical delivery as

Bergman contends in this case, were it not that the regulation provides otherwise; that they may not be proper subjects of gifts either inter vivos or causa mortis has been authoritatively held."

In the case of *Moore's Admr. v. Marshall,* 196 S. W. (Ky.) 369, a syllabus is as follows:

"United States savings bonds authorized by Second Liberty Bond Act and issued pursuant to specified Treasury Department circular and under regulations making such bonds nontransferable were not subject to gift inter vivos, so that, where owner attempted such gift, his administrator, after owner's death, was entitled to recover bonds from donee."

In the case of *Brown v. Vinson,* 216 S. W. 2d 748 (Tenn.), a syllabus is as follows:

"Where rules of federal Treasury Department prohibited transfer by way of gift, sale, or pledge of United States Series E. Bonds, owner's attempt to transfer bonds by gift inter vivos was ineffective and bonds were subject to replevin by owner's administrator after his death."

In the opinion it is said:

"In considering what is the correct answer to the question stated, it is of some importance to note that the donor by request in the manner provided by the regulations had it within his power during his life to cause the re-issuance of these bonds with these donees named as beneficiaries, or in their names. The donor had not, therefore, done all that he could to make the gift inter vivos effective."

The bonds had not been changed. The bonds had not been transferred. They remained as they were originally issued, as follows: "Florence Hendricksen or Ethel V. Kelley" (R. ~~150~~ 151).

Mrs. Kelley, on June 22, 1949, prior to the death of Mrs. Hendricksen, presented six of the bonds for payment, to the Omaha National Bank, and received credit therefor; and after the death of Mrs. Hendricksen, Mrs. Kelley presented the remaining four bonds to the bank and received credit therefor. Mrs. Hendricksen died on the 25th day of July, 1949. This action was brought shortly after the death of Mrs. Hendricksen, by Rohn, the executor of her estate, to require Mrs. Kelley to show cause why the bonds were not assets of the estate of Florence Hendrickson for the money she received from the sale of the bonds (R. ~~160, R. 161~~ 42, 43, 44).

The record shows that the surrender value of the bonds was the sum of $5,918.00 and $3,876.00, or a total sum of $9,794.00; that the controversy in the case at bar involves the question as to the meaning and interpretation of the regulations of the Treasury Department of the United States (R. ~~160, R. 161~~ 43, 47).

Thereafter, the bonds remained the same as they were when issued. They were never surrendered or cashed in until they were cashed in by Ethel V. Kelley, the surviving co-owner herein.

The Supreme Court of Nebraska, in its decision, disregarded the regulations of the Treasury Department of the United States, above referred to.

The respondent alleged in his petition (Par. 3, Petition, 433-60, in the District Court of Douglas County, Nebraska) "that Exhibit 'B' and Exhibit 'C' had the legal effect of making the Series G Bonds in the sum of $10,000.00 a part of the assets of the said estate, for which the beneficiary, Ethel V. Kelley, should be required to account" (R. ~~5~~ 2).

In Exhibit "B" and Exhibit "C," prepared by William Rohn, he purported to have Mrs. Kelley assign, by written assignment, not attached to the bonds, all "interest she may have or purport to have" in the bonds, and had her state "that she had no interest in the bonds at the time her name was placed thereon, and agrees that she shall have only such interest in the bonds as may be given her under the will of Florence Hendricksen" (Ex. 4, R. 110, R. 111).

The petitioner, Ethel Kelley, in her answer, denies each and all of the allegations of the petition (R. 20).

The contention of the petitioner is that the attempted transfer, as arranged and brought about by Rohn, was, in the words of the regulations, "an attempted voluntary transfer inter vivos of the bonds," and is of no effect, as it did not comply with the requirements of the Treasury Department. It flies right in the teeth of those regulations and is a direct violation of the provisions of the regulations.

By the alleged assignment (Ex. 4, R. 110, R. 111), that William Rohn had Ethel V. Kelley sign on the 9th day of May, 1948, she assigned "any interest she may have or purport to have" in the bonds of her mother, Florence Hendricksen. Florence Hendricksen agreed, by accepting said assignment, with Ethel Kelley, that Ethel Kelley "shall have only such interest in the bonds as may be given to her under the will of Florence Hendricksen." The bonds were then in the possession of William Rohn, the attorney for Mrs. Hendricksen. Later, on the 12th day of June, 1949, Mrs. Hendricksen, recognizing her liability to Ethel Kelley, and her obligation to make some provision for Ethel Kelley in her will, after having her-

self secured possession of the bonds from William Rohn, abrogated the purported existing contract she had with Ethel Kelley, by delivering the bonds to Ethel Kelley; and at said time said to Ethel Kelley: "Here they are, Ethel; they are yours." Another witness testified that Mrs. Hendricksen, at the time she delivered the bonds to Ethel Kelley, said: "Ethel, I want you to have these bonds." The bonds were delivered to Ethel Kelley by Mrs. Hendricksen at said time. The bonds had not been surrendered to the Treasury Department for re-issue, but at said time still remained, as they were issued originally, "to Florence Hendricksen or Ethel Kelley," as co-owners. Ethel Kelley acquiesced in the request and direction of Mrs. Hendricksen to abrogate the purported former agreement between the parties, caused and brought about by the paper drafted by William Rohn, and she accepted said bonds as a co-owner, in the condition in which they had originally been issued.

The evidence shows that within a few days of the time that Mrs. Hendricksen got physical possession of the bonds from William Rohn, she turned them over to Mrs. Kelley. All Mrs. Kelley had to do, and did do, was to present the bonds to the bank and cash them in. She surrendered six of these bonds of the maturity value of $6,000.00 before Mrs. Hendricksen died. Mrs. Hendricksen did not change her will after the six bonds were cashed in, nor does the evidence show that she ever made any complaint about Mrs. Kelley obtaining the cash for the bonds. In the absence of any direct evidence to the contrary, it must be presumed that Mrs. Hendricksen wanted to do just what her acts show she in fact did do. She put it in the power of Mrs. Kelley to cash the bonds, which Mrs. Kelley did. No one of the two brothers ever appeared in court to object to the action of Mrs. Hen-

dricksen. This clearly shows that Mrs. Hendricksen, with reference to the purported agreement that William Rohn had secured for her to get Mrs. Kelley to surrender any interest she had in the bonds, intended to abandon any such contract and agreement, and this she did do by turning over the physical possession of all of the bonds to Mrs. Kelley.

Abandonment of Contract May Be Effected by Acts of One of the Parties Inconsistent With Its Existence and Acquiesced in by the Other

In 17 C. J. S. p. 882, par. 389-62, it is said:

> "So, a contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other."

In 12 Am. Jur. p. 1013, par. 433-13, it is said:

> "A contract need not be rescinded by an express agreement to that effect. The rule is well settled that the parties to a contract may rescind it by making a new contract inconsistent therewith. If the parties to a contract make a new and independent agreement concerning the same matter and the terms of the latter are so inconsistent with those of the former that they cannot stand together, the latter may be construed to discharge the former."

In the case of *Hall v. Eccles,* 46 Neb. 880, 65 N. W. 1058, it is said:

> "An abandonment of a contract may be effected by the acts of one of the parties inconsistent with its existence and acquiesced in by the other."

In the case of *Reichert v. Mulder,* 121 Neb. 11, 235 N. W. 680, it is said:

"Contract will be treated as abandoned where each party performs acts inconsistent with its existence and acquiesces in such acts by the other."

In the case of *Nelson v. Cross,* 152 Neb. 197, 40 N. W. 2d 663, it is said:

"Abandonment of a contract may be effected by the acts of one of the parties thereto, where such acts are inconsistent with existence of the contract and are acquiesced in by the other party."

Ethel Kelley, on June 22 or 23, 1949, presented six of said bonds for payment to the Omaha National Bank, prior to the death of Mrs. Hendricksen, and her account was credited, on September 10, 1949, in the sum of $5918.00; and later, on the 10th day of September, 1949, after Mrs. Hendricksen's demise, she presented the remaining four bonds for payment to the said bank, and on December 31, 1949, her account was credited with the sum of $3876.00, as the proceeds of the sale of the $4000.00, maturity value, of the bonds (R. ~~160~~ 43 R. ~~161~~ 47).

That William Rohn was sure that his letter had brought about a valid transfer of the bonds, so as to cut off any interest that Ethel Kelley had in the bonds, is shown in the letter that he wrote to Mrs. Hendricksen on June 11, 1949 (Ex. 7, R. ~~115~~ 27-29 R. ~~118~~), wherein he says:

"You will specifically remember that the $10,000 in bonds are made out to you and Mrs. Kelley jointly, but that we have copies of papers showing you to be the sole owner."

In this Rohn was mistaken.

In the case of *Stephens v. First National Bank of Nevada,* 176 P. 2d 756, Nevada, 1948, as in the case at bar,

the question was the ownership and the right to possession of the bonds. The court said:

> "Mrs. Stephens at the time of the purchase of the bonds in the manner in which they were purchased, to-wit, inscribed to the deceased, Paul F. Glandman and Mrs. Una E. Stephens, as co-owners, thereupon became the co-owner in the said bond and had a property interest therein, and she could be divested thereof only in the form set forth by the government regulations; that is, by removing the bonds from said safe deposit box and cashing the same or having the same reissued."

CONCLUSION

The petitioner contends that this case involves the interpretation and meaning to be placed upon the regulations of the Treasury Department, and particularly upon that part of the regulations relating to the transfer of such bonds as between co-owners of United States Savings Bonds issued by the Treasury Department; the contention of the respondent being that the transfer can be made in conformity with the regulations by one co-owner signing a written assignment and delivering it to the other co-owner, to the effect that all interest in the bonds of said co-owner assignor are thereby terminated and that by virtue of said written assignment only the legal title in said bonds becomes vested in the co-owner assignee solely and alone.

The bonds were not cashed in. The bonds remained as bonds owned by co-owners. The first co-owner died. Her executor claims the bonds as having been transferred to the first co-owner during her lifetime. Subsequent to the delivery of the written assignment, aforesaid, by the second co-owner, the first co-owner, during her lifetime,

made manual delivery of the bonds to the second co-owner, with the statement: "Here they are, Ethel, they are yours."

We respectfully submit that the second co-owner never was deprived of her interest in the bonds, within the meaning of the Treasury regulations, and more particularly Section 315.13, U. S. Treasury Department Regulation governing U. S. Savings Bonds, Department Circular 530, Sixth Revision, February 13, 1945. Such transfer, within the meaning of the Regulations, means the surrender of the bonds to the Treasury Department and the re-issue of the bonds in the name of the chosen transferee. The interest of Ethel V. Kelley was never taken from her. The mother never cashed in the bonds. She turned them over to her daughter, Ethel Kelley, as she desired to do, and as she had the power vested in her to do at the time she turned the bonds over to her daughter. No one will gainsay that the mother did not have the power vested in her by the covenants of the United States Treasury Department, contained in the bonds she turned over to her daughter.

We respectfully submit that the case should be reversed and that Ethel V. Kelley should be declared to be the owner of the bonds, and the proceeds therefrom, and that she should recover her costs herein expended.

Respectfully submitted,

RALPH R. BREMERS,
Attorney for Petitioner.

SEP 12 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

No. 176

October Term, 1953

In the Matter of the Estate of Florence Hendricksen, Deceased.

ETHEL V. KELLEY,
Petitioner,

vs.

WILLIAM F. ROHN, Executor,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

THOMAS P. LEARY,
JOHN F. ROHN,
Attorneys for Respondent.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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OPINION BELOW

The decision of the Supreme Court of Nebraska is reported in 156 Neb. 463, 56 N. W. 2d 711.

JURISDICTION

Petitioner seeks to review the judgment entered herein under "Section 237(b) of the Judicial Code, 28 U. S. C. 344." The statute cited has been considerably amended, the present statute appearing at 28 U. S. C. A. 1257, 2103 and 2106. Respondent believes it unnecessary to set forth in full the statute now applicable.

Petitioner's claim of jurisdiction is opposed for the following reasons:

1. No Federal question was decided by the lower court.
2. The decision of the lower court rested on adequate grounds of local law independent of Federal law.

———o———

STATEMENT OF THE CASE

Petitioner's statement of facts is believed to be inadequate and respondent therefore sets forth in detail the evidence presented to the lower court.

Briefly, the case amounts to this: A and B (mother and daughter) are the named co-owners on $10,000 worth of United States Series G Bonds which were purchased with A's money. After they are so purchased A wishes to make a will equalizing the shares of her three children in her estate. A tells B she must give up the bonds or she (A) will make no provision for B in her will. B consents to "sell, assign and transfer" to A "any interest she may have or purport to have" in the bonds, "and agrees that she shall have only such interest in the

bonds as may be given her under the will" of A. (See Assignment, infra.)

A makes a will giving B a 3/10 interest in her $32,000 estate and dies with the will in force. A retains the written Assignment until her death and the will is probated. Prior to A's death B obtains possession of the bonds.

B cashes $6000 of the bonds prior to A's death and $4000 afterward; at A's funeral B admits the bonds are a part of the estate and says she will turn them over, but when A's executor demands that she pay the proceeds of redemption of the bonds to A's estate, B refuses, claiming that her own written obligation, waiving her right to the bonds and agreeing to take only under A's will, is unlawful.

B claims the protection of certain Treasury Regulations which provide that the *government* will pay the value of the bonds to either co-owner or the survivor. B is now in the position of claiming *both* her 3/10 interest in the estate and the proceeds of the bonds.

The United States Government is not a party to the suit by A's executor against B for the proceeds of the bonds; only the named co-owners are involved.

Testimony Relied on By Petitioner Which is Not a Part of the Record

Petitioner repeatedly refers to two statements by witnesses for Ethel Kelley which appear as follows:

WILLIAM C. JOHNSTON:

"* * * and she said, 'Ethel, I want you to have these bonds.' " (R32)

HARRY KELLEY:

"* * * and she says, 'Here they are, Ethel, they are yours.'" (R52)

These statements were stricken from the record upon objection.

The first statement was stricken as shown by order of the Court at R33. The second statement was stricken by order shown at R52.

Examining the testimony more closely we find:

Testimony of WILLIAM F. ROHN, Executor.

Direct Examination:

Rohn was attorney for Florence Hendricksen for three years prior to her death (R19). She came to his office March 30, 1948 and executed her will (R-19). She delivered to him ten United States Savings Bonds, Series G, Nos. M6-266-759G to and including M6-266-768G, in the amount of $1000.00 each (R19, 20). The bonds were issued to Mrs. Florence Hendricksen or Mrs. Ethel Kelley (R21). At the same time she signed her will she signed the following (R20, 21):

"Mar. 30, 1948

Wm. Rohn:

Today I signed my will in your office. I have $10,000 Series G, United States Savings Bonds Nos. M6-266-759G to and including M6-266-768G. These were purchased with my money only and are to be entirely a part of my estate. My daughter Mrs. Ethel Kelley was in the Stephens Bank with me when they were issued and she requested the bank to issue them in this manner and I permitted it only to prevent

an argument and to save embarrassment. Ethel Kelley is to have only the interest in these bonds that is given her in my will of this same date.

(sgd) Florence Hendricksen"

Rohn talked by phone to Mr. or Mrs. Kelley about six weeks later, at Mrs. Hendricksen's request, and asked them to come to Fremont about the bonds (R21-22). About May 9, 1948, Rohn met Mrs. Hendricksen and Mrs. Kelley and told Mrs. Kelley her mother wanted to obtain an assignment of the bonds, or she would either have them reissued in her own name or redraft her will; that she would cancel the bonds but wanted to avoid the loss of principal that entailed. Rohn told Mrs. Kelley that unless she wished to execute the assignment, the bonds would be cashed or the will redrawn. He read her the assignment; she took it and read it, and then signed it (R23). He identified (R24) the assignment, which is as follows (R24):

"May 9, 1948

"The undersigned Ethel Kelley for value received herewith sells, assigns and transfers to her mother, Florence Hendricksen, any interest she may have or purport to have in $10,000.00 Series G United States Savings Bonds, numbers M6-266-759G, to and including M6-266-768G. Said Ethel Kelley further states that she had no interest in these bonds at the time her name was placed thereon and agrees that she shall have only such interest in the bonds as may be given her under the will of Florence Hendricksen.

(sgd.) Wm. Rohn
Witness

(sgd) Ethel Kelley"

Rohn told Mrs. Kelley that unless she wished to execute it, her mother would make no provision for her in

her will (R24). Rohn had possession of the bonds until June, 1949 (R26, 27). He received a letter from Mrs. Kelley on June 3, 1949, as follows (R26):

"6-3rd-1949

"Please send all of the papers to Omaha.

(sgd) Mrs. Harry Kelley"

He did not send the papers to Mrs. Kelley because Mrs. Hendricksen had told him never to deliver anything to her (R26). He prepared a letter for Mrs. Hendricksen to sign, listing her securities and requesting delivery, which was mailed to her and returned with her signature (R27-28). He then mailed the bonds and other securities to Mrs. Hendricksen on June 11, 1949, with a letter of transmittal (R28-29). She died July 25, 1949 (R8).

The total value of the estate, including the bonds, is about thirty-two or thirty-three thousand dollars (R29). There was personal property and real estate (R17), the real estate having been sold.

Rohn and his father talked to her the day after the funeral; she said she realized the bonds were part of the estate and that she intended to turn them over (R29, 30). She did not tell Rohn she had already cashed $6000.00 worth (R30).

WILLIAM C. JOHNSTON, witness for Ethel V. Kelley.

Direct Examination:

Johnston is an undertaker who lived next door to the Kelleys (R31). On June 12, 1949, he went over to the Kelleys' house and Mrs. Hendricksen gave him the bonds

and some other securities for safekeeping (R31). Three or four days later he was called and asked to return the envelope (R31-32).

Johnston attempted to testify to transactions and conversations with the deceased by which appellant was apparently trying to establish a gift, but this testimony was stricken out on objection (R32-33) since the evidence offered could not be shown as a defense under a general denial, and referred to a conversation with a deceased person.

He verified the amount of the bonds and the names on them (R34).

WILLIAM F. ROHN, recalled.

Cross-Examination:

Rohn testified Mrs. Hendricksen had told him she wanted the bonds to be distributed as an asset of the estate under her will (R35). He suggested she cash the bonds and have them reissued, but she did not want to lose part of her principal (R36), and he told her it could be done in the manner in which it was actually accomplished. He knew the voices of Mr. and Mrs. Kelley but did not remember which one he spoke to (R37). Mrs. Kelley knew he had the will.

He told Mrs. Kelley that the bonds would be surrendered and her name removed, and the will rewritten, if she did not execute the assignment shown as Exhibit 4 (R37). Mrs. Hendricksen had told her substantially the same thing (R37).

He asked Mrs. Kelley privately after the funeral about her position on the bonds and said he did not want

to embarrass her in front of her brothers (R29-30, R39). She said she "realized that those bonds were part of the estate and that she intended to turn them over" (R30, 38).

ETHEL KELLEY, witness on her own behalf.

Direct Examination:

She was with her mother when she bought the bonds (R40). She never saw them again until her mother sent for them in May, 1949 (R44). Mrs. Hendricksen had stayed with the Kelleys for three or four winters and spent the summers at home in Fremont (R44).

She tried to testify she became the owner of them (R41), which was stricken out (R41, 42). She cashed $6000.00 worth in June before her mother's death July 25, 1949 (R42) and received $5918.00 on September 10, 1949 (R43). She cashed the rest of them and received $3876.00 on December 31, 1949 (R43), after her mother's death. Sometime during the early summer of 1949 Mrs. Hendricksen bought a house in Grand Island and lived there a week or ten days (R44). Mrs. Kelley, at her request, went out and brought her back to Omaha, where she lived with them a few months before she died (R44).

She denied she had any conversation with Rohn about signing the assignment of the bonds (R44).

They had dinner, Rohn got up, put the assignment in front of her and said, "Will you sign this?" She just walked over and sort of glanced at it and said, "Yes," and signed her name (R45).

She said Rohn gave her no money for signing it (R45).

She was asked if there was anything said which would lead her to believe that she should sign the paper; she answered, "No, not a thing, not a thing, it was a complete surprise that day" (R45). She denied her mother had ever said anything about it (R45).

Cross-Examination:

Mrs. Kelley said the bonds were bought with her mother's money (R47). She confirmed that she signed Exhibit 4, the assignment of the bonds (R48). She had visited Rohn at his office (R48) but she denied he ever said anything about assigning the bonds (R48). She did not discuss the matter with him before or after she signed Exhibit 4 (R49).

HARRY KELLEY, witness for appellant.

Direct Examination:

He is the husband of Ethel Kelley (R50). He confirmed that Mrs. Hendricksen had stayed with them several winters (R50). After she received the bonds from Rohn they were placed in Johnston's safe (R51). Johnston offered to keep them in his safe and said, "It won't cost you nothing" (R51). Four or five days later he brought them back (R52). The court ruled out his attempt to testify to what Mrs. Hendricksen said when the bonds were passed to Mrs. Kelley (R52).

Cross-Examination:

After Mrs. Kelley obtained possession of the bonds she put them in a cabinet drawer (R54). The rest of the papers Johnston took (R54).

He stated Rohn said nothing about why he came to the house and why he asked Mrs. Kelley to sign the assignment (R55).

Redirect Examination:

Asked why Mrs. Hendricksen wanted all the papers back, he said, "She wanted them all herself; that she was going to get them and put them in a safety deposit box, so she would have them by herself, she said" (R58). When the papers were returned, she was satisfied that she got everything she asked for (R60).

SUMMARY OF ARGUMENT

Proposition I.

The Supreme Court of the United States will exercise jurisdiction only where a decision of a substantial Federal question was necessary for the determination of the cause below and where that question was actually decided or essential to a decision.

Southwest Bell Tel. Co. v. Oklahoma, 303 U. S. 206, 82 L. ed. 751.

Williams v Kaiser, 323 U. S. 471, 89 L. ed. 398.

Proposition II.

Where the testatrix and her daughter, who are co-owners of Series G United States Savings Bonds purchased with the testatrix's money, agree in writing that the daughter shall have only the interest in the bonds given her under testatrix's will, and that the daughter in consideration thereof sells, assigns and transfers to the testatrix any interest she might have or purport to have in

the bonds; and where the testatrix dies in reliance on the contract, the Treasury Regulations, Treasury Department Circular No. 530, Feb. 13, 1945 as amended, have no application to the determination of the equities between the parties, and a court of equity may declare a resulting trust in the proceeds of the bonds in favor of the testatrix's estate.

Martin v Nat. Surety Co., 300 U S. 588, 81 L. ed. 823, 12 A. L. R. 2d 468.

McKenzie v. Irving Trust Co., 65 S. Ct. 405, 323 U. S. 365, 89 L. ed. 305.

Chase v. Leiter, 96 C. A. 2d 439, 215 P. 2d 756.

Succession of Geagan, 212 La. Rep. 574, 33 So. 2d 118.

Union Nat. Bank v. Jessell, 358 Mo. 467, 215 S. W. 2d 474.

Makinen v. George, 19 Wash. 2d 340, 142 P. 2d 910.

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ARGUMENT

Proposition I.

The Supreme Court of the United States will exercise jurisdiction only where a decision of a substantial Federal question was necessary for the determination of the cause below and where that question was actually decided or essential to a decision.

Under the state of facts outlined in the Statement of the Case, supra, none of which are in any substantial dispute, the trial court made findings, in part, as follows (R8-11):

"That on May 9, 1948 the defendant Ethel V. Kelley, at the instance and express request of the deceased and her attorney, William F. Rohn, executed a conveyance of all of her interest in the bonds to the deceased, stating that she agreed to accept only the interest given her under the deceased's will. That such conveyance was in writing, duly witnessed, and a copy is attached to the plaintiff's petition received in evidence in this action. That at the time the deceased had possession of the bonds and could have cashed them or could have revoked her will, and the deceased did not take any such action, but relied upon the conveyance of the defendant as set forth above. That such conveyance was valid and is a subsisting obligation of the defendant based upon a valuable and sufficient consideration * * * That the defendant cashed the bonds and withheld the proceeds and refused to deliver said proceeds to the executor of the deceased's estate upon his demand; that after cashing the bonds she held the proceeds, and does so hold them, as a trustee, under a resulting trust, for the benefit of the executor of the deceased * * * that she is estopped in law and equity from claiming the proceeds as her own * * *

"While under the contract between the government and the persons designated on the bonds as co-owners, the government at the time the bonds were presented for payment was obligated to pay the proceeds of said bonds to defendant, the defendant under the evidence and the above findings was and is bound to pay over such proceeds to the said Florence Hendricksen or her legal representative, the plaintiff in this action. That the laws and regulations of the Federal Government and the Treasury Department have no application to the facts in this case regarding the transfer of said bonds * * *."

The court then found the sum due to the executor, holding that defendant held it under a resulting trust;

that such was a part of the assets of the estate; that the defendant pay same to the executor within 20 days; that if she failed to pay it the executor might set off the amount due against the legacy due defendant in the state and credit the decree with that amount and take such further proceedings as might be necessary in the event of a deficiency.

The Supreme Court of Nebraska, in affirming this decree in equity, fully examined the question and stated:

> "The court decreed that Ethel V. Kelley deliver the proceeds which she obtained from cashing the bonds to the executor in accordance with her assignment of the bonds for a consideration to her mother, whereby she agreed to take her share of the estate as provided for by her mother's will. There is nothing in this phase of the decree contrary to the laws of the United States or the regulations of the United States Treasury Department. Those laws and regulations do not prevent the declaration of a resulting trust in the proceeds of the bonds as shown under the facts of this case."

In reaching this conclusion the Nebraska Court stated its reasons as follows:

> "The primary purpose of the Treasury Department regulations is to prevent the government from being involved in suits between claimants to government bonds. These Treasury Department regulations refer to the bonds themselves, providing protection to the government if its agents pay the named owner or co-owner. In addition, the government's power to borrow money at a fixed rate of interest should not be burdened by defending litigation.
>
> "From an examination of the cases cited by the defendant we are unable to find any case in which a conveyance by one co-owner of savings bonds to an-

other was involved. For the most part the cases cited by the defendant refer to a situation where no positive act of the parties themselves, those who are co-owners of the bonds, intervenes between the time the bonds are issued and the time the dispute arises. The government would have no interest as to how the assets of Florence Hendricksen's estate would be distributed, or that by the last will of Florence Hendricksen Ethel V. Kelley had no further rights in the estate so long as she retained the proceeds of the bonds. It seems clear that the federal laws and regulations are not intended to interfere with the positive act of two co-owners of bonds by which one conveys her interest in them to the other. In the instant case, as shown by the evidence, Ethel V. Kelley assigned all her right, title, and interest in the bonds to her mother during her mother's lifetime, and for a valuable consideration. The evidence also shows that she acknowledged that the proceeds of the bonds constituted part of the assets of her mother's estate, and her assignment of the bonds clearly indicates such to be true.

"The government's interest is a contractual one. Its obligation was to pay either of the co-owners the amount agreed upon as shown by the bonds upon their proper presentation, in compliance with the Federal law. When the Treasurer of the United States satisfied the government's obligation by paying the proceeds of the bonds to Ethel V. Kelley, the government's interest in the matter ended. The government is in no sense a party to this litigation and under the facts and circumstances could in no event have any interest in the result of this litigation."

The syllabus to the opinion of the Nebraska Court made no holding as to the bearing or effect of the Treasury Regulations on the rights of the holders of the bonds.

Plainly, the Nebraska trial court and Supreme Court ruled that the Treasury Regulations did not apply to

this case. They held so because *the circumstances under which they would apply had ceased to exist.*

If this suit had been brought against the United States by the executor of a deceased co-owner of Series G bonds, the government need not recognize a written assignment of the bonds. But after the bonds have been paid to the surviving co-owner, and the United States completely discharged of any obligation to the parties, it is unnecessary for the government to recognize the contractual rights and duties between the original parties to the bonds. These are left to be enforced by the local courts.

This Nebraska decision is only a holding that under the local law a court of equity may declare a resulting trust in the *proceeds* of United States bonds, *after payment by the government to a party named as co-owner,* so as to enforce the contractual rights of the parties under a separate agreement, under which agreement the surviving co-owner had solemnly promised to take her share of the estate rather than keep the proceeds of the bonds.

The key to the decision is the time at which this cause of action arose. It did not arise upon the death of the testatrix or upon the execution of the contractual assignment. It arose when the petitioner, having received payment from the United States for the bonds, determined to keep the money for her own and refused to account for it to the executor of the deceased co-owner.

A simple parallel might be stated: A and B own Series G bonds purchased with A's money. For personal

reasons A decides B should not have any money after his death. During A's lifetime B cannot cash the bonds because A has possession. Before A can act upon his decision B steals the bonds. Before B is caught A dies. When B is apprehended he has cashed in the bonds and now claims the protection of the Federal Treasury Regulations.

Would any court hesitate to impose a resulting trust on the proceeds of the bonds for the benefit of A's estate? Yet this is practically the state of affairs in the present case. The only difference is the method of B's obtaining possession. How this was accomplished is not clear from the record. It is significant that her mother never surrendered possession of the written assignment. Her mother may very well have meant her to have the bonds for safekeeping.

The Nebraska's Court's decision does not in any way criticize the Federal Government or its agents for making payment to petitioner. There was no necessity to set aside that transaction in any respect. The Court might have recognized legal title in petitioner and the right to receive payment of the bonds. It was when she received that payment and kept it, contrary to contract with her mother, that the court of equity intervened.

It should be unnecessary to review the powers of courts of equity, either generally or under Nebraska law. Chancery jurisdiction progressed early to correct the abuses which arose under strict interpretation of common law. Its powers were invoked to obtain a fair result.

The local probate court, in exercising these powers, was confronted by the written obligation of the petitioner

to take her share under the will rather than the proceeds of the redemption of the bonds. The legatee refused to abide by her agreement, resolving to have her cake and eat it too. The court decreed that she pay into the estate what should have been there in the first place—the same amount of money that the bonds were worth when cashed. After doing so, petitioner might receive the share promised her under her mother's will.

Here are matters only of private concern. If petitioner at one time had rights under Federal law and regulations by which she might cash the bonds and keep the proceeds, she effectively waived and relinquished those rights by her written contract with her mother. Her mother died relying on petitioner to carry out her bargain. Instead petitioner presents the argument, and asks this Court to rule, that her own signed obligation is unlawful.

Certainly the testatrix could have cashed the bonds during her lifetime and wiped out the interest of petitioner. That is exactly what the testatrix told petitioner she was going to do unless she agreed in writing to forego her rights as co-owner and accept her share of the entire estate. She was also told that the testatrix would change her will and disinherit her unless she waived these rights. At that time petitioner had her choice and made it; she should not now be permitted to assail the legal effect of her own conveyance.

Let us examine the Treasury regulations which petitioner claims apply to this case. The intent of the regulations and the reasons for their existence should be noted:

> "Sec. 315.15: Neither the treasury department or any agency for the issue, reissue or redemption of savings bonds will * * * undertake to protect the interests of litigants who do not have possession of the bonds."

Here is the clear expressed intention of the Department, found in its own regulations, that the United States has no interest in, and will not protect the interest of a party who does not have possession of the bonds. Petitioner does not have possession of the bonds. Her dealings with the United States are over and the possibility of conflict between the Federal Government and private claimants ended.

Do these regulations indicate that the Treasury Department intended them to be frozen rules of law by which the rights of all parties are forever fixed, and that upon payment to the beneficiary the Department will follow him forever and shield him from ordinary legitimate claims to the proceeds of the bonds?

> "Sec. 315.13. A claim against an owner or co-owner of a savings bond and conflicting claims as to ownership of or interest in such bonds as between co-owners * * * will be recognized when established by valid judicial proceedings, and payment or reissue will be made upon presentation and surrender of the bonds * * *."

Plainly, this regulation is directed toward conflicts and litigation which arise *before* the bonds are redeemed. It presupposes that neither party has cashed the bonds, and provides in that situation that the Treasury Department will, after claims are resolved in a competent tribunal, pay to the party who is found to be entitled to

receive the proceeds. *In this action there is no claim which must be recognized by the Government.*

The purpose of the regulation is only to prevent Savings bonds from being circulated as currency. If they are transferred to third parties, whose names are not on the bonds, the Treasury Department will pay only the named registrant regardless of court proceedings. The regulations, as they apply to the present case, are rules to protect the Government when it pays the named obligee, not rules of property.

Nowhere in the regulations is it expressly declared to be unlawful to register the bonds in the name of one other than the real owner. As a matter of fact, the regulations impliedly admit that the bonds may be so registered in the case of trusts:

> "Sec. 315.48 (e). *Registration Not Disclosing Trust.*—If the form in which the bond is registered does not show that it belongs to a fiduciary estate or does not identify the estate to which it does belong, satisfactory proof of ownership must be furnished."

These bonds were registered in the name of the real owner, Florence Hendricksen. Ethel Kelley's right of survivorship has never been questioned by the decision of the lower court. The petitioner has exercised that right and received the money. The Government's interest in the private obligations between the named co-owners of the bonds has ceased to exist. The lower court decided in effect that under separate contract petitioner was required to pay the funds she received as survivor into her mother's

estate, and this decision rendered in accordance with equitable principles prevailing in the local court.

The rule is expressed in *Southwest Bell Tel. Co. v. Oklahoma,* 303 U. S. 206, 82 L. ed. 751:

> "2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it."

Respondent submits that the state court decision in this case proceeded entirely upon grounds equitable in nature, that the local court may declare a resulting trust upon the proceeds of the bonds and compel a legatee to discharge her separate contractual duty; the Treasury regulations did not apply to the circumstances as presented in this case.

Williams v. Kaiser, 323 U. S. 471, 89 L. ed. 398, held:

> "12. Where a decision of a state court might have been either on a state ground or on a Federal ground, and the state ground is sufficient to support the judgment, the Supreme Court of the United States will not undertake to review it."

Proposition II.

Where the testatrix and her daughter, who are co-owners of Series G United States Savings bonds purchased with the testatrix's money, agree in writing that the daughter shall have only the

interest in the bonds given her under testatrix's will, and that the daughter in consideration thereof sells, assigns and transfers to the testatrix any interest she might have or purport to have in the bonds; and where the testatrix dies in reliance on the contract, the Treasury Regulations, Treasury Department Circular No. 530, Feb. 13, 1945 as amended, have no application to the determination of the equities between the parties, and a court of equity may declare a resulting trust in the proceeds of the bonds in favor of the testatrix's estate.

The leading Federal case in this Court on assignments prohibited by statute is *Martin v. Nat. Surety Co.*, 300 U. S. 588, 81 L. ed. 823, 12 A. L. R. 2d 468.

The statute there concerned appears in 31 U. S. C. A., Par. 203, and it provided that an assignment of funds due under a government contract was *absolutely null and void* unless executed before two witnesses, after the claim was liquidated, allowed and a warrant for payment issued. Claims arose between parties to an assignment in which these conditions had not been complied with. The Court held:

> "The provisions of the statute making void an assignment or power of attorney by a Government contractor are for the protection of the government. * * * In the absence of such a rule, the government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment, and the chance of multiple liability. * * * But as applied to the fund in controversy, that peril is now past. The fund is in court, to be distributed to rival claimants, with the government discharged irrespective of the outcome. * * * A transfer of the fund after payment is perfected is of no concern to anyone except the parties to the transaction, and this quite irrespec-

tive of the time of the assignment or the manner of its making." (See also McKenzie v. Irving Trust Co., 65 S. Ct. 405, 323 U. S. 365, 89 L. ed. 305.)

The regulations issued under the Second Liberty Bond Act do not make an assignment null and void, but only provide that the Government will not recognize it. Thus the regulations are not nearly so stringent as the statute construed in the Martin case.

Likewise, the contract between petitioner and respondent's testatrix was not an assignment in the sense contemplated by the regulations. The names of Ethel Kelley and Florence Hendricksen were already on the bonds and the instrument executed by Mrs. Kelley did not purport to transfer anything to a third party to the bonds. Mrs. Kelley's written agreement amounted to no more than a *release* or *waiver* of rights to which she might otherwise be entitled.

Reviewing the cases in the State Courts cited by petitioner, not a single one involved a contract or conveyance by a named co-owner to another co-owner. Petitioner's citations refer to situations where the contradictory claims arise upon the happening of an *event*, such as the death of a co-owner. State law might give the decedent's spouse a statutory interest in the bonds, but Federal law overrides and transfers the bonds to the other co-owner. The regulations were not intended to interfere with a positive act of the two co-owners of the bonds, by which one conveys or releases his interest to the other.

A recent California case is *Chase v. Leiter*, 96 C. A. 2d 439, 215 P. 2d 756 (Mar. 13, 1950). A husband and wife executed a joint will in which they provided that

all of their jointly-held property should be community property, and that neither was to dispose of it. The husband and wife owned United States Savings bonds, Series G, standing in the name of George or Ida, as joint owners. Upon the death of the husband the wife claimed the bonds entirely as her own. The estate claimed part of them under the joint will in which the parties agreed the bonds be considered community property.

Here was the voluntary agreement between the two co-owners, providing that upon the death of one, the other should not take all, but part of the bonds should become assets of the estate of the deceased as community property. The California community property law was involved only because the co-owners had agreed that it should apply to the bonds. The court treated it as a contract, the same as the lower court treated the written conveyance by Ethel Kelley of all her interest in their bonds to her mother. In a well-reasoned opinion the court stated:

> "* * * Government bonds provide for a type of co-ownership similar to joint tenancy. Whether the bonds are payable to 'A or B', or 'A payable on death of A to B', it is clear that the government does not want A wrongfully to defeat the rights of B. There are many cases holding that as between B and the estate of A, B is entitled to payment. * * * Such cases involve no voluntary agreement between A and B that someone other than B shall take, upon the death of A. * * *
>
> "*If the parties voluntarily enter into an agreement* concerning interests in the bonds, which agreement is approved in a divorce decree, the government will recognize such an agreement. It is logical that if the parties voluntarily agree to a particular

treatment of the bonds, and such agreement is approved in this action, the government could and would have no objection. The principal things that the government wants to prevent is A giving away B's rights without B agreeing to it.

"The regulations cannot be used to perpetrate a fraud. The cases have not hesitated to impose constructive trusts on the proceeds in order to achieve a fair result. * * *

"In the following cases it was held that the treasury regulations did not prevent a court of equity from ordering the named co-owner or beneficiary to pay over the proceeds of the bonds to some other person: Succession of Geagan, 212 La. 574, 33 So. 2d 118. (Deceased used community funds to purchase bonds in name of son. Son ordered to turn over half of proceeds to widow.) Olsen v. Olsen, 70 N. Y. S. 2d 838, (Joint and mutual will held to be a binding contract. Surviving husband was held bound to conform to it, even with respect to property he took as surviving joint tenant or surviving co-owner of government bonds.) Union Nat. Bank v. Jessell, supra (215 S. W. 2d 474). In this case, mentioned previously, the spouses executed a joint and mutual will in which it was agreed that the survivor would leave his property to a trust set up by the will. The husband survived and during his survivorship purchased government bonds in the names of himself and some children. In spite of the treasury regulations, the appellate court affirmed a judgment ordering the children to cash the bonds and turn the proceeds over to the executor, saying: 'The court has decreed that the named payees cash the bonds and deliver the proceeds to the executor in accordance with the will and there is nothing in this phase of the decree contrary to either the laws of the United States or the regulations of the United States Treasury Department. Those laws and regulation do not prevent the declaration of a resulting trust in bonds purchased

in fraud of marital rights. (Citations.) And they do not prevent the recovery of the proceeds of bonds if they have been purchased with fraudulently acquired funds or funds expended in fraud of creditors. (Citations.) In this connection it is not necessary to characterize the conduct of the testator. It is sufficient to say that the testator was obligated by the compact of the joint and mutual will with his wife to devise and bequeath their property to the trust regardless of his subsequent good intentions and changed circumstances. The purchase and gift of the bonds to the children was in direct violation of that compact.' * * *

"Even if the regulations prevent the court from holding that title to the bonds was changed, the court can order the widow to act so as to carry out the agreement she entered into."

This case was a clean-cut decision on the proposition that a contract between co-owners of Series G bonds, changing the terms and conditions for payment of the bonds, will be enforced by impressing a resulting trust on the proceeds of the bonds.

Let us examine the three arguments used in support of survivorship under the Treasury regulations. These are:

1. The Federal Government cannot be harassed by conflicting claims.
2. The bonds are a contract between the purchaser and the Government for the benefit of the surviving co-owner.
3. Sale of the bonds might be adversely affected unless they are paid to the surviving co-owner without exception.

The first argument we have already answered. The United States is not a party to this suit. It has paid its obligation according to the terms of the bonds. We have no quarrel with the strict legality in which the bonds were redeemed. Had Ethel Kelley cashed them in good faith, intending to turn the proceeds over to the executor, no controversy would result. It was at the moment when the petitioner, having received the money, determined to keep it as her own, that she violated her written contract with her mother.

The second argument, that the bonds are a contract for the benefit of a third person, is completely inapplicable. Ethel Kelley might well cling to this principle if the bonds had simply been issued as they were and nothing else done. But prior to the time she obtained possession of them, and prior to the time her rights would have vested on her mother's death, *she contractually waived and relinquished that right* by a written assignment based on a consideration. Having renounced any interest she might have in the contract between the Government and her mother, she cannot now advance a claim founded on the theory of a third party beneficiary.

As to the third argument, the petitioner cannot seriously contend that the decree entered herein would affect the marketability of savings bonds. Would any person's faith in the Government's credit or integrity be diminished if he knew that, having bought the bonds and registered them in co-ownership with another, a court would sustain his conveyance of his interest to the other co-owners? To carry this argument further, a contrary rule might actually promote the sale of such bonds to

dishonest persons, who, having assigned the bonds for value, as was done in this case, could relax comfortably in the knowledge that they would get the proceeds anyhow upon the death of the co-owner.

A decree imposing a resulting trust upon anything actually recognizes legal title in the holder. The Treasury regulations say only that the Government will recognize title in a holder whose name appears on the bonds. But the decree may certainly provide that the holder make good his obligation to the owner of the equitable title. The regulations were not intended to be frozen rules by which all property rights are forever fixed.

In *Succession of Geagan,* 212 La. Rep. 574, 33 So. 2d 118, community funds belonging to a husband and wife were used to purchase savings bonds in the name of the husband and son as co-owners. The court held the son was entitled to cash them but entered a judgment against him for one-half the proceeds in favor of the wife.

Union Nat. Bank v. Jessell, et al., 358 Mo. 467, 215 S. W. 2d 474, was a declaratory judgment action involving savings bonds. Testator and his predeceased wife had executed joint and mutual wills to bequeath their property to a trust. The testator bought co-ownership bonds with his son, using his own money and money from his wife's estate. The court held the son must cash the bonds and account for the proceeds to the testator's estate, to be disposed of under the trust, as the parties had originally agreed.

In *Makinen v. George,* 19 Wash. 2d 340, 142 P. 2d 910, a decedent deeded real estate to her daughter. The

daughter sold it and bought savings bonds, registering them in the name of the mother as sole owner. The daughter claimed them because they were bought with her money. The court established a resulting trust in favor of the daughter and said:

> "It will be noted that regulation I of the treasury department, relative to registration, does not expressly declare that it shall be unlewful to register such bonds in the name of one other than the real owner. Nor do we find any general regulation declaring that it shall be unlawful for any person to have bonds registered in the name of one other than the true owner. * * *"

Petitioner claims her mother could have cashed the bonds and thus avoided any controversy. This was Mrs. Hendricksen's privilege up to the time of her death. But petitioner admits she obtained possession of them in June, over a month before her mother's death and cashed $6000.00 worth. How could Mrs. Hendricksen have done anything when her daughter had already taken the bonds out of her control and cashed them?

Petitioner's written contract with her mother necessarily implied that she would not herself cash the bonds unless she turned over the proceeds to her mother or her personal representative after her death. In any event petitioner clearly understood her obligation that she would not keep the money for herself.

The decision of the lower court amounted only to granting specific performance of petitioner's contract to receive her share of her mother's estate rather than the proceeds of the bonds.

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CONCLUSION

The contradictory position of petitioner is plain. She signed a conveyance and release of her right of survivorship in the bonds to her mother. She agreed to take only such interest in them as was given her under her mother's will. She cashed the bonds and kept the money. She repudiated the assignment without giving any factual explanation for its invalidity. She does not claim she was incompetent; she does not claim she didn't read it; she does not claim she didn't sign it. She says only that the instrument she signed is unlawful and she refuses to abide by it.

It is clear that as a 3/10 residuary legatee in her mother's estate she will receive the interest in the bonds that was promised.

Petitioner never contributed a penny toward the purchase of the bonds; her claim is based entirely on the protection of a departmental regulation which she has contractually waived. It is clear that as a 3/10 residuary legatee she will receive the interest promised in her mother's estate, and which she agreed to take.

We submit that after the Federal Government issues the bonds, it will not, in addition to guaranteeing payment to the named beneficiary, thereafter follow him around indefinitely, and, like a protective halo, render him completely immune from any ordinarily legitimate claims thereto.

As mentioned before, we take no exception to Ethel Kelley's cashing the bonds, or the Government's payment to her in accordance with *its* obligation. But at

the moment she refused to honor *her own* obligation, and determined to keep the money for herself, this cause of action arose.

The Treasury Department is not being harassed by any claim in this action. The sale of its bonds cannot by any stretch of the imagination be affected by the lower court's decision. Ethel Kelley has effectively given up any contractual right she may have had as a third party beneficiary to the bonds.

Respondent submits that the decision of the Nebraska Supreme Court in this case was based upon an entirely adequate and independent ground of local law. There was no decision upon the Federal law and no necessity for one.

We respectfully pray that the writ be denied.

Respectfully submitted,

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